IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2004 Session

ELAINE M. LARSON ET AL. v. TOMMY K. HALLIBURTON

Appeal from the Circuit Court for Smith County
No. 5260 Clara Byrd, Judge

No. M2003-02103-COA-R3-CV - Filed October 7, 2005

This appeal involves a dispute over the visitation rights of the maternal grandparents of four children. After the children's mother died, the relationship between their father and their maternal grandparents became strained. Eventually, the grandparents filed a petition in the Circuit Court for Smith County seeking to establish their right to visit their grandchildren. Following a bench trial, the trial court granted the petition and prescribed visitation rights for the grandparents. The children's father has appealed. We have determined that the trial court misapplied the rebuttable presumption in Tenn. Code Ann. § 36-6-306(a)(5) (Supp. 2004) and, therefore, the order granting the visitation rights to the grandparents must be vacated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Jacky O. Bellar, Carthage, Tennessee, for the appellant, Tommy K. Halliburton.

Debra L. Dishmon, Lebanon, Tennessee, for the appellees, Elaine M. Larson and Larry J. Larson.

OPINION

I.

Tommy and Janet Halliburton married in 1992 and resided in Pleasant Shade, Tennessee. Mr. Halliburton worked as a sawmill manager during the week and held down two other jobs on the weekend. Ms. Halliburton worked at a manufacturing facility in Lafayette, Tennessee. Mr. Halliburton's weekday work schedule required him to be away from home from 5:30 a.m. until 8:00 p.m. His two weekend jobs also required him to work long hours. Ms. Halliburton's schedule was equally demanding. She routinely left home by 6:00 a.m. and did not return until late in the evening.

The Halliburtons' first child, Bradford Anthony Halliburton, was born in November 1993. Within six weeks after the child's birth, the Halliburtons realized that they would not be able to care

for their son and maintain their work schedules. Accordingly, they asked for assistance from Elaine and Larry Larson, Ms. Halliburton's parents. The Larsons wanted to help, and so Ms. Larson began caring for her grandson in the Halliburtons' home ten hours per day during the week. This required Ms. Larson to arise each morning at approximately 4:00 a.m., drive for thirty minutes to the Halliburtons' home, and then return to her home in Sykes, Tennessee after the Halliburtons came home in the evening. She continued this routine after the Halliburtons' second child, Elizabeth Elaine Halliburton, was born in June 1996 and after their third child, Benjamin Keith Halliburton, was born in April 1999.

Ms. Larson took on other parenting responsibilities as the children got older. When the children began to attend school, she dressed them and drove them to and from school. She also attended the children's school events, took them to the doctor, and escorted them other places as well. Mr. Larson was also actively involved with his grandchildren, even though he continued to work as a grocery store manager. He helped his wife at the Halliburton home, delivered cupcakes to the children's schools for holiday parties, and arranged special activities with his oldest grandchild on Wednesday afternoons.

In November 2001, after caring for her grandchildren for eight years, Ms. Larson decided that she needed to work part-time. She found employment at the same plant where her daughter worked in order to better coordinate their schedules. While Ms. Halliburton continued to work five day shifts per week, Ms. Larson worked three evening shifts which began at the end of Ms. Halliburton's shift and lasted until 12:15 p.m. Accordingly, Ms. Larson would tend to the three Halliburton children each work day, and on three evenings during the week, she would also work at the manufacturing plant. On the three nights she worked, Ms. Larson would make the one-hour drive back to her home in Sykes, sleep for a few hours, and then arise at 4:00 a.m. to drive to the Halliburton home to take care of the children.

Maintaining this routine became burdensome for Ms. Larson. Accordingly, Mr. Halliburton suggested that she stay at their home in a spare bedroom several nights during the week. Despite feeling uncomfortable about imposing on the Halliburtons, Ms. Larson stayed at the Halliburtons' home from Monday through Thursday nights for over one year. Eventually, Peggy Halliburton, Mr. Halliburton's mother, began caring for the children on the days that Ms. Larson worked the evening shift.

In April 2002, Ms. Halliburton gave birth to the Halliburtons' fourth child, Brooke Ann Halliburton. Tragically, Ms. Halliburton died suddenly and unexpectedly eight days after her child was born. To help Mr. Halliburton out, Ms. Larson continued to live in the Halliburtons' home and take care of her four grandchildren. Mr. Halliburton and the Larsons also agreed that Ms. Larson would not work during the summer so that she would be better able to care for the children.

Shortly after his wife's death, Mr. Halliburton became upset with the Larsons because they were unavailable to take care of the children during a weekend even though they had promised that they would. The Larsons' absence prevented Mr. Halliburton from working and required him to care for all four children at the same time, an endeavor that he had not tried before. Following that

weekend, Mr. Halliburton informed Ms. Larson that he had decided to hire someone to care for the children, that her services would no longer be required, and that it would no longer be necessary for her to stay in his home.[1]

The relationship between Mr. Halliburton and the Larsons began to deteriorate at that point. While the Larsons continued to visit their grandchildren, their visits became shorter and less frequent. Eventually Mr. Halliburton and Mr. Larson stopped speaking to each other, and the animosity spread to other members of Mr. Halliburton's family. When the Larsons attended the children's school events, none of the Halliburtons would have anything to do with them. Eventually, the Larsons decided that they were no longer welcome at the Halliburton residence.

Mr. Halliburton viewed the deterioration in his relationship with the Larsons as a consequence of his efforts to gain control of his and his children's lives. He desired to get his children "settled in" following their mother's death, and he believed that Ms. Larson was trying to exert too much control over him and his children. Accordingly, he set out to create some distance between himself and his children and the Larsons. He testified that he told the Larsons that they could visit their grandchildren anytime, as long as they asked him permission first.

In January 2003, following an awkward and unfortunate incident during the Christmas holidays, the Larsons filed a petition in the Circuit Court for Smith County seeking to establish visitation rights with their grandchildren. In May 2003, the Larsons requested the trial court to order psychological examinations of the children. The trial court denied the motion but appointed a guardian ad litem to advocate the children's best interests. Following the Larsons' testimony at the June 2003 hearing, the trial court announced that they had succeeded in establishing a rebuttable presumption that denying them visitation with their grandchildren would result in substantial harm to the children. Accordingly, the trial court dispensed with the remainder of the Larsons' proof and directed Mr. Halliburton to put on proof to rebut the presumption. Following the presentation of Mr. Halliburton's evidence, the trial court ruled from the bench that the Larsons were entitled to visit the three older Halliburton children for one weekend each month, two days during the Christmas holidays, and one week during the summer. The trial court also prescribed visitation rights for the youngest child.

Mr. Halliburton filed post-judgment motions and also requested a stay of the judgment pending appeal. The trial court denied the motions. Mr. Halliburton perfected this appeal. In October 2003, the Larsons petitioned the trial court to hold Mr. Larson in criminal contempt for frustrating their visitation. This record contains no indication of the outcome of the criminal contempt proceeding.

[1]This conversation upset the Halliburton children. When the two oldest children asked Ms. Larson who was going to take care of them, Ms. Larson told them that their father would take care of them. However, after Ms. Larson moved out of the home, Mr. Halliburton's parents moved in and began taking care of the children.

II.
THE TRIAL COURT'S PREDISPOSITION TOWARD GRANDPARENT VISITATION

Mr. Halliburton first takes issue with the trial court's impartiality. He insists that the trial court was predisposed to grant the Larsons visitation rights even before the hearing to determine whether they should be accorded these rights began. While the trial court's comments at the beginning of the hearing could reasonably be interpreted as reflecting bias, we have determined that these comments, viewed in context, do not reflect an inappropriate bias against Mr. Halliburton.

At the beginning of the June 3, 2003 hearing, the following colloquy occurred between the trial court and the lawyer representing Mr. Halliburton:

> The Court: Mr. Bellar represents Mr. Halliburton. Okay. Mr. Bellar, is Mr. Halliburton opposed to the grandparents having visitation?
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> Mr. Bellar: We're opposed to the grandparents having court-ordered visitation, Your Honor.
>
> The Court: What visitation does he [Mr. Halliburton] give them without any court-ordered visitation? Is it a choice of court-ordered visitation or none? Is that where we are?
>
> Mr. Bellar: No, it's not.
>
> The Court: How much is he giving them?
>
> Mr. Bellar: That's a matter of strong dispute, Your Honor, as to how much they've had. His position is . . . there's no substantial harm, and this is a substantial harm case. . . . But that's not his position that they shouldn't have visitation. It's just visitation that's convenient to him and the children, and that he shall guide the children's lives, not Mrs. Larson. There's a good bit of rancor that developed here – unnecessarily, in our view – and this Court can only make it worse by court-ordered visitation.
>
> The Court: Worse than none?
>
> Mr. Bellar: Worse than none.
>
> The Court: I don't think that's possible.

When Mr. Halliburton's lawyer later questioned the trial court regarding her statements, the court stated, "What I'm saying is none [no grandparent visitation] is not good." The Larsons' lawyer then

pointed out that none of the parties, including Mr. Halliburton, were opposed to grandparent visitation, and Mr. Halliburton's lawyer stated that no proof had been admitted to show that having no visitation would be harmful to the children.

Persons having business in Tennessee's courts have the right to the "cold neutrality of an impartial court." *Leighton v. Henderson*, 220 Tenn. 91, 98, 414 S.W.2d 419, 421 (1967); *Chumbley v. People's Bank & Trust Co.*, 165 Tenn. 655, 659, 57 S.W.2d 787, 788 (1933). Impartiality is one of the central tenets of our judicial system. Tenn. S. Ct. R. 10, Canon 2(A). Thus, judges must strive not only to be impartial in fact, but also to conduct themselves both on and off the bench in ways that avoid the appearance of partiality. *In re Cameron*, 126 Tenn. 614, 658, 151 S.W. 64, 76 (1912); *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998).

Questions regarding a judge's impartiality raise fairness concerns only in circumstances when the judge's personal bias or prejudice against a litigant can be reasonably questioned. A judge's general opinions regarding legal or social issues, while of interest in some circumstances, do not necessarily provide a basis for questioning a judge's impartiality. *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313-14 (Tenn. Ct. App. 1999); Jeffrey M. Shaman, et al., *Judicial Conduct and Ethics* § 4.04, at 101-02 (2d ed. 1995).

While the trial court's comments in this case are close to the line, we do not consider them to reflect an inappropriate bias against Mr. Halliburton. Taken in context, the trial court's comments reflect a belief in a generally accepted notion that permitting grandparents to visit their grandchildren is a good thing. The parties themselves agreed that grandparent visitation was appropriate; they simply disagreed on who should set the ground rules. Accordingly, we have concluded that the trial court's comments do not provide a basis for requiring her to step aside in this case.

III.
THE TRIAL COURT'S APPLICATION OF TENN. CODE ANN. § 36-6-306

Mr. Halliburton also argues that the trial court erred procedurally and substantively in deciding that the Larsons were entitled to court-ordered visitation. Specifically, he insists that the trial court misapplied the rebuttable presumption of irreparable harm to the child in Tenn. Code Ann. § 36-6-306(a)(5). Mr. Halliburton is correct. The record contains no evidence supporting the trial court's conclusion that the Larsons were entitled to this presumption.

A.

The concept of family is one of the fundamental building blocks of our society. Tenn. Code Ann. § 36-3-113(a) (2001). Parental autonomy is the cornerstone of this concept. *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935 (1977); *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992); *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 182 (Tenn. Ct. App. 2000). Thus, public policy strongly favors permitting parents to raise their children as they see fit, free from unwarranted governmental interference. *Bellotti v. Baird*, 443 U.S. 622, 638, 99 S. Ct. 3035, 3045 (1979).

Visitation decisions are among the rights reserved to parents. Accordingly, the courts have held that an otherwise fit parent's visitation decisions must be given "material weight," *Troxel v. Granville*, 530 U.S. 57, 72, 120 S. Ct. 2054, 2063 (2000), and that courts may not intervene in a parenting decision in the absence of a showing that the decision has or will cause significant harm to the child. *Hawk v. Hawk*, 855 S.W.2d 573, 581 (Tenn. 1993) (invalidating Tennessee's grandparent visitation statute because it permitted the courts to override a parent's visitation decision without a showing of substantial harm).

In 1997, the Tennessee General Assembly enacted new statutes governing the visitation rights of grandparents.[2] These statutes explicitly incorporated the Tennessee Supreme Court's holding in *Hawk v. Hawk* that courts could not grant grandparents visitation with their grandchild over their parents' objection without proving that the children would be substantially harmed by the denial of visitation. As a result of these statutes, in contests between parents and grandparents, the courts will not override the parents' visitation decision without a finding of substantial harm to the child. *See Toms v. Toms*, 98 S.W.3d 140, 145 n.5 (Tenn. 2003); *Simmons v. Simmons*, 900 S.W.2d 682, 685 (Tenn. 1995).

Grandparents desiring to obtain court-ordered visitation rights with their grandchildren over the objection of their parents must first demonstrate the existence of one of five statutorily defined circumstances. Tenn. Code Ann. § 36-6-306(a).[3] Second, they must demonstrate that their grandchild has or will experience "substantial harm" if visitation is not ordered. Tenn. Code Ann. § 36-6-306(b). Finally, they must convince the trial court, using the factors in Tenn. Code Ann. § 36-6-307 (2001), that permitting grandparent visitation would be in the best interests of the child. Tenn. Code Ann. § 36-6-306(c).

The statute also addresses the circumstances that will support a finding that the child will suffer substantial harm if his or her grandparents are not granted visitation. Tenn. Code Ann. § 36-6-306(b)(1) provides that the court may find substantial harm if the child has a "significant existing relationship" with his or her grandparents and (A) the loss of that relationship is "likely to occasion severe emotional harm to the child," (B) the grandparent functioned as a primary caregiver and that the cessation of that relationship "could interrupt provision of the daily needs of the child and thus occasion physical or emotional harm," or (C) the loss of the relationship "presents the danger of other direct and substantial harm to the child." In addition, Tenn. Code Ann. § 36-6-306(a)(5) establishes a rebuttable presumption of "irreparable harm"[4] if the child has "resided in the home of

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[2] Act of May 29, 1997, ch. 503, 1997 Tenn. Pub. Acts 918, codified at Tenn. Code Ann. § 36-6-306 & -307 (2001 & Supp. 2004).

[3] These circumstances include: (1) the father or the mother of the minor child is deceased, (2) the child's mother and father are divorced, legally separated, or were never married, (3) the child's mother or father has been missing for not less than six months, (4) a court of another state has granted the grandparents visitation, or (5) the child lived in the grandparent's home for twelve months or more and was later removed by his or her parent.

[4] We perceive a substantial difference between the "substantial harm" required by Tenn. Code Ann. § 36-6-306(b) and the "irreparable harm" required by Tenn. Code Ann. § 36-6-306(a)(5). This case does not require us to ascertain the full extent of this difference.

the grandparent for a period of twelve (12) months or more." It is the applicability of the burden-shifting presumption in Tenn. Code Ann. § 36-6-306(a)(5) that is at the heart of this case.

B.

The Larsons' petition for visitation is based solely on their daughter's death. This is a proper ground for seeking visitation under Tenn. Code Ann. § 36-6-306(a)(1). On the day of the trial, the Larsons were prepared to call twelve witnesses, including themselves, to establish the existence of substantial harm under Tenn. Code Ann. § 36-6-306(b) and to provide evidence that granting them court-ordered visitation would be in their grandchildren's best interests under Tenn. Code Ann. § 36-6-307. The Larsons were the first two witnesses to testify. Following their testimony, the trial court announced that their testimony alone was sufficient to trigger the rebuttable presumption of irreparable harm under Tenn. Code Ann. § 36-6-306(a)(5). Accordingly, the trial court dispensed with the remainder of the Larsons' proof and directed Mr. Halliburton to present evidence to rebut the presumption that preventing his children from visiting the Larsons "would result in irreparable harm." Mr. Halliburton presented eight witnesses, and at the close of his case, the trial court concluded that he had not succeeded in carrying his burden of rebutting the presumption in Tenn. Code Ann. § 36-6-306(a)(5).

The trial court erred by sua sponte invoking the rebuttable presumption in Tenn. Code Ann. § 36-6-306(a)(5) and thereby shifting the burden of proof to Mr. Halliburton. The presumption arises only in circumstances in which, in the words of the statute, "[t]he child[ren] resided in the home of the grandparent for a period of twelve (12) months or more." The statute does not apply to circumstances in which the grandparent has lived in the children's home for twelve month or more. The Larsons never claimed that any of the children lived in their home in Sykes for twelve months or more. Accordingly, the record contains no evidence to trigger the presumption of "irreparable harm" in Tenn. Code Ann. § 36-6-306(a)(5).

In cases like this one in which the presumption in Tenn. Code Ann. § 36-6-306(a)(5) does not apply, a trial court's conclusion that the child or children will suffer substantial harm must be based on "proper proof." Tenn. Code Ann. § 36-6-306(b)(1). Because the trial judge truncated the Larsons' case, this record does not contain "proper proof" establishing that Mr. Halliburton's children will be substantially harmed if the trial court does not establish court-ordered visitation for the Larsons. Without an adequately supported finding of "substantial harm," the trial court erred by proceeding to address the best interests of Mr. Halliburton's children. Tenn. Code Ann. § 36-6-306(c) ("[u]pon an initial finding of danger of substantial harm . . . the court shall then determine whether grandparent visitation would be in the best interests of the child"). Therefore, we vacate the order granting the Larsons visitation with their grandchildren and remand the case to the trial court for further proceedings.

IV.
THE APPOINTMENT OF A GUARDIAN AD LITEM

As a final matter, Mr. Halliburton takes issue with the trial court's decision to appoint a guardian ad litem for his children. He asserts that the trial court had no reason to be concerned about

his children and that the trial court went too far when it appointed the guardian ad litem at the parties' expense. We have no basis to second-guess the trial court.

Tenn. R. Civ. P. 17.03 vests in trial courts the discretionary authority to appoint a guardian ad litem for infants or incompetent persons "whenever justice requires" and to allocate the fees for the guardian ad litem's services to the parties. Because these decisions are discretionary, we will review them using the more relaxed "abuse of discretion" standard of review. As we have so often noted, a trial court will be found to have "abused its discretion" only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

We have reviewed this record and find no basis for concluding that the trial court erred by invoking its authority under Tenn. R. Civ. P. 17.03 to appoint a guardian ad litem for these children.[5] Children caught between feuding adults oftentimes benefit from the dispassionate assistance of a guardian ad litem. In light of the evidence regarding the relationship between the Halliburtons and the Larsons, we decline to second-guess the trial court's decision.

V.

We vacate the order granting the Larsons visitation with their grandchildren and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to Tommy K. Halliburton and his surety and to Elaine M. Larson and Larry J. Larson.

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WILLIAM C. KOCH, JR., P.J., M.S.

[5] We add, however, that we are somewhat at a loss to understand why the trial court did not grant the Larsons' motion to arrange for psychological examinations of the children. Tenn. R. Civ. P. 35 provides a framework for these examinations. *See Odom v. Odom*, No. M1999-02811-COA-R3-CV, 2001WL 1543476, at *4-9 (Tenn. Ct. App. Dec. 5, 2001), *pet. reh'g denied*, (Tenn. Ct. App. Jan. 8. 2002) (No Tenn. R. App. P. 11 application filed). Expert opinions regarding the effect of terminating the children's relationship with their grandparents would be particularly helpful, especially in light of the exacting standards of Tenn. Code Ann. § 36-6-306(b). However, since the Larsons have not taken issue on this appeal with the trial court's denial of their motion, we have no occasion to determine whether the trial court erred by declining to order psychological examinations of the children.